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**Issue date: 04Oct2001**

In the Matter of

ROBERT TERRELL
Claimant

v.

WMATA
Employer

and

CRAWFORD & COMPANY
Insurer

and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest

Case No. 1993-DCW-11 & 1993-DCW-12
OWCP No. 40-116007 & 40-122218

# DECISION AND ORDER
# ON REMAND

The Department of Labor administers several federally established trust funds designed to fund and pay compensation, under specified circumstances, to workers in various industries for injuries suffered in the course of their employment. There is, for example, a Special Trust fund established by Congress to compensate longshoremen and harbor workers, under specific circumstances not here pertinent, injured in the course of their employment; a different Trust Fund compensates certain coal miners injured by the inhalation of coal dust. Claimant Terrell in this case is receiving compensation paid by a third trust fund established to cover certain workers compensation claims arising in the District of Columbia prior to 1984.[1] He sought an increase in the amount of compensation he receives from the Fund, and the Director refused to defend insisting that the Employer perform this important public function.[2] The Board agreed in a decision many employers in the coal industry, as discussed below, may find intriguing. *See*, Terrell v. Washington Metrolpolitan Area Transit Authority, 34 BRBS 1 (2000).

I.

The threshold question this matter presented was whether and to what extent the Employer, Washington Metropolitan Transit Authority(WMATA), had standing to challenge Claimant's Motion to Modify an award of compensation benefits paid, not by his employer, but by the federally administered D.C. Special Fund.[3] Nearly two decades ago, the Board in Angelo v. Bethlehem Mines Corp., 6 BLR 1-593 (1983) itself had ruled that Employers in the coal industry lacked standing to challenge the claims of coal miners under circumstances in which the black lung Trust Fund, not the particular employer, would be responsible to pay the compensation if a claim were found meritorious. In Angelo, the Board relied upon Gange Lumber Co. v. Rowley, 326 U.S. 295 (1945) and the Seventh Circuit's

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[1]By way of background, Claimant, Robert Terrell, since January 6, 1985, has been receiving compensation payments for permanent partial disability under the Longshore and Harbor Workers' Compensation Act (LHWCA) as applied to the District of Columbia Worker's Compensation Act. Terrell suffered injuries on the job working as a bus driver for WMATA. Pursuant to an agreement among all parties, the Deputy Commissioner on March 31, 1989, entered a Compensation Order approving and accepting the Employer's defense under Section 8(f) of the Act and awarding payments to Terrell commencing January 6, 1985 from the federally administered Special Fund. The Employer was then believed of its obligation to pay any further compensation to Claimant for permanent disabilities arising out of the injury and would not be responsible for payment of any increase in the award if Claimant's Motion for Modification on the ground that he is now permanently and totally disabled proved meritorious. Claimant thus seeks to upgrade his disability from permanent partial to permanent total status.

[2]The 1984 Amendments to the Longshore Act which would allow a covered employer to participate in a Special Fund proceeding under that Act, do not apply to the District of Columbia. Keener v. WMATA, 800 F.2d 1173, (CADC, 1986))

[3] In its brief on remand, WMATA again addressed its standing to participate in this matter. See, WMATA brief at 4-5.

decision in Railway Express Agency v. Kennedy, 189 F.2d 801 ($7^{th}$ Cir. 1951) in support of its ruling.

A.
Angelo Interprets Gange Lumber

Thus, following the Board's guidance, I too relied upon Gange Lumber and Railway Express in my Order dated June 24, 1998, which declined to permit the Employer to defend the D.C. Trust Fund. A copy of the June 24, 1998, order is annexed hereto as Appendix A and incorporated herein by reference. The Director and the Employer appealed; the Director to affirm his right to abdicate responsibility to defend the fund; the Employer to establish standing to defend the fund.

On February 16, 2000, the Board, seemingly unaware that the Director was urging it to abandon the interpretation of Gange Lumber which it adopted in Angelo, endorsed the Director's outcome oriented use of Gange Lumber. Terrell, *supra*. To be sure, the Director's counsel devoted three pages of her brief on appeal to the "Grange" (sic) decision, but apparently eschewed consideration of both the Board's decision in Angelo and the analysis of Gange her colleagues proffered to the Board in their Angelo filings. *See*, Dir. Br. at 12-14. Thus, pondering the various profundities urged upon it by the Director, the Terrell Board distinguished Gange Lumber from this case on two grounds. Both perceived distinctions, however, apply equally to Angelo, but Angelo reached a different result.

In granting WMATA party status in this matter, the Board reasoned that: "Two distinctions between *Grange* (sic) *Lumber*[4] and the instant case compel our holding." These "compelling" distinctions presumably are crucial to the analysis. First, the Board reasoned that; "unlike the instant case, *Grange Lumber* concerned not the issue of standing, but the allegation that a potential increase in an employer's insurance fund assessment amounted to a deprivation of property and thus a violation of due process.... By contrast, the instant case solely concerns employer's right to participate in a formal hearing." Terrell, *supra* at pg 5-6. Yet the factors Terrell Board uses to distinguish this case from Gange Lumber; i.e., the

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[4] In her brief to the BRB, the Director's counsel uniformly mis-cited the Gange decision as *"Grange"* at least eight times. Thereafter Board, which followed the Director's guidance, seems to have uniformly mis-cited the decision exactly the same way seven times in its analysis. Terrell, *supra* 5-6.

employer's right to a hearing, apply equally to Angelo, which, of course, barred a coal industry employer from participating in the adjudication of a claim.

In Angelo, as here, the ALJ had dismissed the employer as a party and ordered the Trust Fund to pay benefits without rendering "a decision on the merits." Angelo, at 1-594. In the context of the Judge's dismissal, the Angelo Board cited Gange Lumber as authority which supported the employer's dismissal;

> **The Board concludes that the employer is not a party 'adversely affected' by the decision below and therefore lacks standing to appeal....** A party has an appealable interest only when his property may be diminished, his burden increased, or his rights detrimentally affected by the order sought to be reviewed... Publically administered, employer financed trust funds have been held not to constitute property of contributing employers. Gange Lumber Co. v. Rowley, 326 U.S. 295, at 310...(1945); Railway Express Agency v. Kennedy, 189 F.2d 801 (7th Cir. 1951), cert. denied, 342 U.S.830...(1951)." Angelo at 1-595(emphasis added).

The Terrell Board and Angelo Board seem to read Gange Lumber a bit differently.

The Terrell Board also detected a second critical distinction between this matter and Gange Lumber:

> "Second, critical to the Supreme Court's holding in *Grange Lumber* was that under the relevant state law, the employer had a right to participate fully in the evidentiary hearings precisely because an insurance award might affect its premium rate, such that the Court held that the law provided adequate procedural safeguards against arbitrary action. Id. at 302-303. By contrast, the focus of the instant case concerns the administrative law judge's denial of employer's right to participate in such a hearing." BRB, D&O at 6.

Yet, the "focus of the instant case" is, in this respect, precisely the same as the focus of Angelo. The ALJ in Angelo also denied the employer the "right to participate in such a hearing," and the employer objected to that ruling. On appeal, the Angelo Board specifically concluded that Gange Lumber and Railway Express authorized the dismissal of the employer notwithstanding the distinction which Board now construes as "critical."[5]

B.1
Angelo Rejects an
Employer's Lose Experience

Moreover, the Board in Angelo specifically rejected another rationale adopted by the Terrell Board in this case. Although Angelo was a case arising under the Black Lung benefits program, the Angelo Board relied upon Longshore Act precedent in rejecting an employer's contention that increased lose experience which effected its future premium rates necessitated that it be given standing. Angelo at 1-595, citing Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 156 (2nd Cir. 1976).[6] Since the D.C. Fund is responsible for Terrell's compensation, its position is analogous to the insurance carrier in Delaventura while WMATA's is analogous to Delaventura's employer, but the analogy is even closer.

B.2
Standing to Settle Claim

Like the employer in Delaventura, WMATA concedes that it lacks sufficient standing in this matter to address in a settlement precisely the issue of compensation raised by Terrell's request for modification:

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[5]The Board's discussion of Section 924 (b)(1) of the [Black Lung] Act in Angelo had no bearing on its analysis of Gange, Railway Express or Dellaventura, and was cited as an alternative ground for its action at the end of its decision. Further, while the Special Fund at issue here and the miners' Trust Fund are funded via different mechanisms, the Gange "distinctions" the Board addressed in this instance were not predicated on the funding mechanisms but rather a series of mutable legal interpretations which coincide with the Director's antipodal outcome oriented articulations.

[6]While the Director raised other arguments in this matter citing the Administrative Procedure Act (APA)and the Department's rules regarding participation of parties, it may be noted that the APA predates Angelo, and Department's rules, in effect when Angelo was decided afforded party status to; "Any individual" whose "rights may be prejudiced by a decision." *See*, 20 CFR § 725.352(d) (1983).

Q. All right. In a case such as this, as you appear here as the party in standing, could you settle this case with Mr. Terrell? Has any thought been given to WMATA settling it? Could you settle the case such that I'll issue an order against the trust fund to pay him the amount that WMATA agrees he should be paid?

A. I do not believe that we're [WMATA] allowed to do that.

Q. So you're here as party in standing but you haven't -- you would not have the authority to settle the case with him, is that correct?

A. We could settle the medicals and I believe the attorney's fees, but not the compensation benefits.

Q. Not the compensation part? And what about the Director? Could the Director have settled the compensation part and paid Mr. Terrell the compensation?

A. I believe so.

Q. So the Director could settle with him but they're not here. And you would have no authority as you understand the nature of the Act as the way it's -- to settle the compensation claim because you wouldn't have standing to commit the fund to do that.

A. Correct. Tr. 35-36.

Under analogous circumstances, an employer that lacked standing to affect a settlement was found also to lack standing to litigate its "interests" in the settlement consummated by its insurer. *See,* Delaventura, *supra*.

## C.
## The D.C. Free-For-All

Further, under the D.C. funding formula, WMATA pays precisely the same portion of this claimant's compensation as it pays for every other worker receiving compensation from the D.C. Trust Fund regardless of the worker's employer.[7] Consequently, WMATA's alleged "future injury" arising out of this "immediate request for increased compensation" is the same "injury" it would sustain if this "request" were filed by some other employer's worker. It has the same percentage "interest" in every compensation payment made by the D.C. Special Fund.

Thus, adopting the Director's rationale, WMATA should be afforded a right to participate in a similar proceeding brought by virtually anyone employed by a District employer receiving compensation from the D.C. Fund. Conversely, and equally important, Director's arguments and rationale, as adopted by the Board, suggest that other D.C. employers who contribute to the fund should be afforded the opportunity to participate as a party in every D.C. Fund case regardless of the firm who employed the injured worker. The Board noted without discussing the chaotic implications of its decision; but clearly, if WMATA's standing is predicated on its percentage contribution to Claimant's compensation, under the District funding formula used here, other contributors to the District Special Fund, such as Traveler's Insurance, Liberty Mutual Insurance, Lumberman's Mutual, and many others, have similar, if not greater, exposure to "direct injury" in this matter since they will pay similar, if not greater, percentages of Terrell's compensation than WMATA. *See*, Footnote 9, *infra*. The Director, however, deals with their "interests" in this case by simply ignoring them, although, as discussed below, the duty to protect the federally administered fund rests with the Director.

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[7]The following colloquy at the hearing demonstrates the point:

"Judge Levin: And I take it the way the fund was structured, WMATA pays 16 percent (per the Board's finding) the way the formula operates. If for example, I see across the street ... there's major construction companies...that are building the convention center. They got employees all over. They dug a huge hole, as you probably know, and have been working on it now for three or four years...and I take it that under the old Act, had that been constructed and had one of those[employees] ...been...on 8(f) trust fund compensation, exactly the way Mr. Terrell is now, WMATA's responsibility towards the employee of the other company would be the exact same 16 percent that it is with respect to Mr. Terrell's compensation?

MS. O'Donoghue: Yes, sir." Tr. 36

D.
Substantiality of "Direct Injury"

Nor did the Terrell Board, *supra*, consider the substantiality of any alleged "direct injury" as Gange Lumber mandates. While the Board focused on percentages, left unanalyzed were the actual dollar amounts involved here. The record shows the increase in compensation sought by Terrell amounts to $221 per week of which WMATA, under the D.C funding formula, is responsible for 10%, equaling $22.10 per week, or $1,149.20 per year.[8] Although this amounts to less than two tenths of one percent of the Employers direct payments in 1996,[9] it is unclear what percentage of the Employer's Trust Fund liability this may represent, and neither the Director nor the Board has determined, in accordance with Gange Lumber, whether the speculative premium increase, assuming it actually materialized, would constitute a "substantial harm" within the meaning of Gange. *See*, Gange at 66 S. Ct. 130, 131. As Gange demonstrates, however, the burden of establishing the substantiality of the injury in a case such as this rests with the party who asserts the injury, and neither WMATA nor the Director has adduced evidence which addresses anything more than the most superficial assertions.

Indeed, the Director's petulant resistence to cooperate in the development of this record, including its decision not to attend the hearing on August 3, 1998, renders any finding that Terrell's request will have the "direct affect of increasing

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[8] Based upon information supplied to the Board on appeal by the Director, the Board concluded that WMATA "direct payments" render it responsible for 16% of the Fund's payments. This information was not supplied at the hearing, (*Compare* Director's Brief to BRB *with* Director's Memo filed June 1, 1998 at pgs.5-6.) yet the Board which is ever vigilant and acutely sensitive to alleged violations of the APA by Administrative Law Judges, adopted and used the Director's extra-record "facts" in rendering its decision. Nevertheless, if the extra-record 16% is used, (*See*, Terrell, at fn. 8.), WMATA's exposure in this case is $35.36 per week, which represents only a small marginal increment to a "substantiality" analysis under Gange.

[9] If WMATA's standing is predicated on the "direct increase" in its contribution to the D.C. fund as a consequence of Terrell's request, the Director's extra-record "facts" show that Travelers Insurance Company, Liberty Mutual Insurance Company, and Lumberman's Mutual Insurance Company, among others, will experience a similar, if not, greater increase than WMATA. Yet the Director afforded them no notice of this proceeding, and the Board provided no rationale for denying them standing.

employer's assessment" without record support. All this record permits is the conclusion that Terrell's request is a factor which may indirectly effect the Employer's assessment in the future depending on the level of its "direct payments." Thus, it is possible under the D.C. funding formula that Terrell could receive an increase in compensation even while WMATA experienced an actual decrease in the amount of its D.C. fund assessment.

Beyond the relatively small dollar amount of WMATA's exposure here, it is not likely that the fund's disbursements will remain static. To the contrary, there is evidence in the record that notwithstanding the outcome of Terrell's request, WMATA's liability to the fund may decline over time. Tr. 39. As the total number of workers on the fund's rolls decline, by operation of natural law or otherwise, WMATA's future premiums may decrease even assuming the number of its employees on the rolls remains the same and notwithstanding the increase in compensation to Terrell. Indeed, as explained by no less an authority than the Director; if, in the future, WMATA's "direct payments" were to decline to zero, WMATA would pay no percentage of Terrell's compensation even if Terrell continued to receive compensation from the Special Fund. Consequently, the finding that Terrell's request will result in a "future direct increase" in WMATA's assessment is somewhat speculative.

D.
Director's Delegation of the Defense of the Fund
Adversely Impacts Other Fund Contributors

While the Director's counsel focused on WMATA's financial interests in this matter, lost in the fog of her rhetoric, is the interest of other D.C. contributors who pay the remaining 90% of the Fund's resources, some of whom may contribute as much or more than WMATA. Thus, the Courts have held that only the Director has any real interest in protecting the financial integrity of the Special Fund, ( *See, e.g.* Director v. Cargill, Inc., 15 BRBS 30 (CRT) (9th Cir. 1982); George Hyman, *supra* at 39 (CRT); *See also*, Director v. Brodka, 643 F.2d 154 (3rd Cir., 1980); and Gurule v. Director, 11 BRBS 664 673 (1979)), and this case demonstrates rather starkly the potential adverse consequences when the Director seeks to pawn off his fiduciary duties to others.

Claimant Terrell is seeking an increase in his compensation on the ground that his condition has advanced from permanent partial to permanent total disability. He proffered medical and vocational evidence in support of his claim. The

Director refused to participate and insisted that WMATA defend the Fund.[10] The Board acquiesced. In the proceedings on remand, however, WMATA failed to produce any recent medical evidence or any expert vocational evidence.

So the Director deferred defense of the Fund to a private litigant, and the result is captured in the following colloquies at the hearing:

> Q. So you're now claiming what, there's a subsequent intervening cause of some sort?
>
> A. Yes, sir.
>
> Q. Which doctor? Do you have a doctor who's assessed it that way?
>
> A. No, sir.
>
> Q. You don't?
>
> A. No. Tr. 29.

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With respect to the defense that Terrell could return to work as a bus driver:

> Q. Do you have a physician who's addressed this issue subsequent to his [Terrell's] failure of the DOT physical?
>
> A. No, sir.
>
> Q. Okay. What's the most recent medical report you have in the record now? Is it '95?
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> A. I believe so, yes. Yes, sir. Tr. 31

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[10]While the Director was willing to invest no resources in the development of evidence relating to the merits of the claim in defense of the Fund, the Director spared the Fund no expense in the bureaucratic quest to institutionalize on appeal the Director's abdication.

With respect to a defense to Claimant's vocational evidence:

> Q. Okay. Have you done a vocational evaluation of him?
>
> A. No, sir.
>
> Q. Have you had a doctor look at the vocational report that Claimant [produced]?
>
> A. No, sir.
>
> Q. No, sir. Do you have medical evidence that addresses -- now, I know this was opening and -- but I do have the documents in evidence. I haven't had an opportunity to look at it, Ms. O'Donoghue, because I just received them this morning, but Mr. Bender tells me that there's a medical report that assesses Claimant's physical capacity to do a certain number of physical activities, bending, lifting, reaching, grabbing, all these other things that they do when they assess these things. Have you had a physician address those physical capacities by way of examination or evaluation of Mr. Terrell recently, since 1995?
>
> A. No, sir. Tr. 32-33

Whether these concessions reflect a litigation strategy or a financial decision not to mount a medical defense in light of its limited exposure, WMATA's decision illustrates that private litigants act, as they should, in their own narrow pecuniary interests, not necessarily the public interest. Attorneys' fees aside, WMATA's defense of its $22.10 per week($1149.50 annual) stake in this case, ($35.36/weekly, 1838.72/annually if the Board's evidence is used) may not coincide with the interests of those who contribute the remaining to 90% of Terrell's compensation. Thus, the Circuit Court in Cargill, observed:

> Only the Director has a real interest in protecting the fiscal integrity of the Fund against unjustified payments. Cargill at 31 (CRT).

The Board disagreed. Now, the D.C. Special Fund, abandoned by the Director, will bear responsibility for the benefits claimed.

II.

The record shows that Terrell was injured during a robbery on June 4, 1977 while he was employed with the WMATA when he was hit on the shoulder and neck with a steel pipe by three men with a gun. He, thereafter, on March 9, 1978, suffered a second accident employed by WMATA when the bus he was driving skidded on ice causing the bus to strike other vehicles.

Following the June 4, 1977 and the March 9, 1978 accidents, Terrell was treated conservatively for two years before undergoing a cervical fusion operation at the C6-7 levels of his cervical spine in 1979. He continued to work for WMATA for a period of time, but he was terminated in 1992. He then went to work as a driver for Prince George's County Ride On Bus from 1992 through March 1993. He experienced neck pain while driving the Ride On Bus. In September 1993, Terrell secured a position as a bus driver with Fairfax County, and he remained in that position until March 1995 when his neck pain became so severe he could not return to employment with Fairfax County as a bus driver.

Terrell continued his medical care and treatment with Hamid Quaraishi, M.D. and Earl Mills, M.D. Dr. Quraishi treated him from September 9, 1993 though September 11, 1997. He saw Dr. Quraishi on September 9, 1993, because of increasing pain in the neck to the left. Claimant reported to Dr. Quraishi that when he moved his neck in certain directions especially when he was driving a Ride On bus he suffered increased pain. Dr. Quraishi ordered an MRI examination which was eventually performed on October 22, 1994. The MRI examination showed a disk degeneration and bulging at the C5-C6 level more prominent on the left causing anterior compression of the spinal cord on the left.

Dr. Quraishi referred Terrell to Dr. Earl Mills, a neurosurgeon, who examined the Claimant on December 5, 1995. Dr. Mills found that the Claimant sustained a very large and prominently protruding disk at C5-C-6 which appeared subligamentously herniated. Dr. Mills recommended that the Claimant continue physical therapy, but that if his therapy produced worsening of symptoms in his neck and upper extremity, he would recommend an anterior cervical disectomy and spinal fusion at the C5-C6 level.

Terrell continued his treatment including therapy with Dr. Quraishi's office in 1995 including hot packs, massage, ultrasound, and exercise program as well as cervical traction. He completed his physical therapy on April 13, 1995 but did not experience much overall change or decrease of his pain and continued to have severe pain in his neck radiating down to his left arm and elbow. As a result of the failure of therapy to relieve Terrell's pain, Dr. Quraishi recommended cervical disectomy and fusion surgery at the C5-C6 level. Dr. Mills concurred in Dr. Quraishi's recommendation, and the surgery was scheduled and performed at Greater Southeast Community Hospital on August 24, 1995, and involved an anterior cervical disectomy at C5-C6, bilateral foraminotomy at C5-C6 followed by an anterior cervical fusion at C5-C6. A bone graft was taken from the right iliac crest.

Terrell was discharged from Greater Southeast Community Hospital on August 25, 1995 and continued treatment with Dr. Quraishi thereafter. He had several follow-up visits with Dr. Quraishi on September 1, 1995, September 29, 1995, October 27, 1995, December 1, 1995 and January 15, 1996. Dr. Quraishi tentatively released Mr. Terrell to attempt to return to work driving a connector bus on January 22, 1996.

In order to drive the bus, Terrell was required to complete a physical examination for the Department of Transportation. He was examined at the Saratoga Medical Center on January 18, 1996, and the physician on duty completed a form that Terrell was not qualified and failed the physical examination for driving a bus due to limited range of motion of his neck and upper extremities. As a result, Terrell was unable to return to his position with Fairfax County since passing the DOT physical examination was a requirement to drive the bus.

Since failing the DOT physical, Claimant has only worked at three limited low wage part-time jobs for short periods of time. Specifically, Terrell worked for D&D Enterprises as a safety service patroller from approximately February 2, 1997 to March 3, 1997 and earned $1,805.00 as evidenced on his W-2 form. He was unable to continue working in that position, however, because of the severe neck pain he incurred while driving. He next worked for Safeway Corporation as a part-time courtesy clerk from November 1, 1997 to February 14, 1998 earning a total of $800.91 on his W-2 form for 1997 at $5.50 per hour. Terrell was required to lift heavy objects and reach above his head and stopped working at that position, because of the severe pain in his neck caused by the lifting and reaching above his head. Finally, Claimant worked for the Welcome Corporation as a car parker from March 13, 1998 to July 14, 1998 earning $5.50 per hour at approximately 3 days per week (i.e., 24 hours per week). He stopped working at that position because of the severe physical pain in his neck and shoulder as a result of driving. Terrell testified without contradiction that he has severe pain in his neck and shoulders currently and despite taking medication he still suffers severe pain.

Dr. Quraishi reported in a report dated September 11, 1997, that it was his medical opinion, considering Terrell's problems with his neck, his age, experience and education, that Claimant is permanently and totally disabled for any meaningful job. The record shows that Terrell, due to his on the job injuries, is no longer able to drive a bus. Consequently, the burden of proof then shifts to the Director to establish that there are suitable available jobs which the Claimant has a realistic opportunity to secure based upon his medical condition. Bumble Bee Seafoods v. Director, Office of Workers' Compensation Programs, 629, F.2d 1327, 1329 (9th Cir., 1980); Lentz v. Cottman Co., 852 F.2d 129, 131 (4th Cir. 1988).

WMATA contends that Terrell is not permanently and totally disabled because he can still perform the duties of station manager which include sliding a heavy metal gate, carrying luggage for passengers through turnstiles, passing out literature, carrying transfer tickets, and answering phones. WMATA acknowledges that it fired Terrell from the station manager job and that it is not available to him, but it contends it terminated him for good cause. It also argues that Terrell is capable of performing light duty, and in any event, his condition is due to an intervening cause. The record fails to support any of these contentions.

Terrel testified credibly and without contrary evidence adduced by WMATA that he was terminated for allegedly stealing $5.50 from a farecard machine. WMATA prosecuted him and he was subsequently acquitted. Following his acquittal, he brought action for false arrest and malicious prosecution and won a verdict of $100,000 which WMATA subsequently paid. The station manager job, despite Terrell's acquittal, is no longer available to him. Moreover, Terrell credibly testified, thus corroborating vocational expert, Ms. Lee Mintz' conclusion, that even if it were, he is no longer capable of performing some of the physical requirements it entailed. WMATA aduced no medical or expert vocational evidence to the contrary.

Nor has WMATA adduced any medical evidence to refute the expert opinions of Dr. Quarishi and Ms. Mintz that Terrell is permanently and totally disabled. While contending that he can perform light duty jobs, it has identified no such suitable alternate employment in this record, and no expert vocational evidence to refute Ms. Mintz' conclusion. It contended that it had medical evidence that Terrell could go back to work as a bus driver, but acknowledged that its evidence in this regard predated Terrell's failure of a DOT medical examination which was performed precisely for the purpose of determining whether he secure his bus driver's license, Tr.32, and WMATA adduced no more recent medical evidence to support its assertions.

Finally, WMATA contends that after Terrell was terminated from WMATA, and prior to losing his bus operator's license, he worked as bus driver for another company. During the time of this employment we are told by WMATA that "he frequently moved his neck in extreme distances to the left and right and drove the bus over potholes several times a daily" and these activities "caused a new injury in Claimant's neck." Emp. Br. at 5-6. WMATA's theory is interesting, and Claimant did report pain symptoms while working, but a review of the medical evidence fails to document an intervening cause of his condition. While WMATA may question the etiology of Terrell's medical condition, and while it may believe his condition is attributable to some cause other than his work at WMATA, the burden rests with WMATA to rebut the Section 20 presumption, and, absent any contrary medical evidence to support these suspicions, its case is fatally flawed.

Thus, Dr. Quraishi noted on May 15, 1990, and October 22, 1993, that Claimant had a continuing problem with his neck emanating from his WMATA injuries which he monitored through 1995 and January of 2001. In contrast, while there is evidence that Claimant suffered pain symptoms while employed subsequent to his termination by WMATA, WMATA cites no physician who either attributed Claimant's current condition to any intervening injury or identified an etiology other than his covered accidents.

Moreover, no evidence was presented that there is any job or any category of jobs Claimant could perform. The record shows that Claimant, on his own, diligently sought alternative employment but due to his disability and residual pain he was unable to continue and sustain such employment. Dr. Quraishi opined that Terrell is totally disabled and Ms. Mintz, after reviewing, pertinent vocational factors concurred. The record contains no expert medical or vocational evidence which refutes the documented well-reasoned and credible testimony of Claimant, Dr. Quraishi and Ms. Mintz. I, therefore, find and conclude that Claimant is permanently and totally disabled. His request for modification of his prior award must be granted. Claimant's average weekly wage at the time of his original accident in 1977 was $384.94. The order will be based thereon. Claimant's counsel may file for his fee at his convenience.

ORDER

IT IS ORDERED that the Director pay to Claimant compensation for permanent and total disability since January 18, 1996, at the compensation rate of $232.63 per week with a credit for sums paid under the prior award of $10.91 per week.

A
STUART A. LEVIN
Administrative Law Judge
Date Signed: October 4, 2001

## APPENDIX A

| | | |
|---|---|---|
| In the Matter of | : | Date Issued: June 24,1998 |
| ROBERT TERRELL<br>Claimant | : | Case No. 93-DCW-11 &<br>93-DCW-12 |
| v. | : | OWCP No. 40-116007<br>40-122218 |
| WMATA<br>Employer | : | |
| and | : | |
| CRAWFORD & COMPANY<br>Carrier | : | |
| and | : | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS<br>Party in Interest | : | |

ORDER GRANTING, IN PART,
AND
DENYING, IN PART,
MOTION FOR PROTECTIVE ORDER

Since January 6, 1985, Claimant, Robert Terrell has been receiving compensation payments for permanent partial disability under the Longshore and Harbor Workers' Compensation Act (LHWCA) as applied to the District of Columbia (DCWCA). Terrell suffered injuries on the job working as a bus driver for the Washington Metropolitan Area Transit Authority (WMATA). Pursuant to an agreement among all parties, the Deputy Commissioner on March 31, 1989, entered a Compensation Order approving and accepting the Employer's defense under Section 8(f) of the Act and awarding payments to Terrell from the Special Fund commencing January 6, 1985. The Employer was then relieved of its obligation to pay any further compensation to Claimant for permanent disabilities arising out of the injury.

I.

Claimant now contends that he is permanently and totally disabled and thus seeks to increase the compensation paid to him by the Special Fund. WMATA contests Claimant's petition and seeks discovery which Claimant opposes. Claimant moves for a Protective Order and other relief which would, inter alia, bar WMATA's further participation in this matter.

Claimant argues that the Special Fund, as represented by the Solicitor of Labor, not WMATA, is the real party in interest in this matter. In Claimant's view, WMATA lacks standing to defend the Special Fund or subject him to discovery. In response, the Employer cites Section 908(f)(2)(B) of the Longshore Act, as amended September 28, 1984; which provides "After cessation of payments for the period of weeks provided for in this subsection, the employer or carrier responsible for payment of compensation shall remain a party to the claim..." (Employer 4/24/98 Response pg.3, emphasis in Response). Because the 1984 Amendments to the Longshore Act are without effect on the law of the District, (See, Keener v. WMATA, 800 F.2d 1173, (CADC, 1986)), and in view of the Employer's emphasis on the Amendments, (See, Employer's 4/24/98 Response, pgs. 3,4, and 5), a hearing on the motion was scheduled and convened on May 15, 1998. The Director appeared and participated in the proceedings.

At the hearing, WMATA argued that although it would not be responsible for any increase in compensation if benefits were increased from permanent partial to permanent total disability, the amount WMATA contributes to the Special Fund would increase, and consequently, it has a financial stake in the outcome of the proceedings. (Tr. 12-13, 22). For purposes of this proceeding, WMATA agrees with Claimant that any decision on the merits of Claimant's petition to increase his Special Fund compensation would have no effect on WMATA's obligation to pay medical benefits or its liability to pay Claimant any compensation. (Tr. 17-18, 19, 22).

As clarified, the issue is whether an Employer has standing, under the Longshore Act as applicable to the District in 1982, to oppose a Claimant's effort to increase a Special Fund award from permanent partial to permanent total disability. Pertinent to that inquiry is the method by which Employers in the District are assessed their contribution to the Special Fund. The Director was thus requested, post-hearing, to provide the formula the Fund uses in assessing the amount District employers contribute to the Fund, and the parties were invited to comment further upon issues addressed at the hearing.

II.

The Director advises that the Fund "acquiesces in the general industry position that the amendment to LHWCA §44(c) enacted in 1984 is not applicable to assessments for the separate 'special fund' maintained under LHWCA §44 for cases under the 1928 DCWCA." Thus, the Director "acquiesces" to the Court's decision in <u>Keener</u>, <u>supra</u>. Prior to the 1984 Amendments, the assessment formula used to calculate each carrier's (including self-insurer's, <u>see</u> LHWCA §2(5)) share of the overall total annual assessment was based solely on the ratio of that carrier's direct payments of compensation and medical payments under the Act to all carriers' payments (under the 1972 version of § 44(c)). The 1984 Amendments, not here applicable, changed that method. Pursuant to the Amendments, the Fund contribution of an Employer subject to the Amendments is based half on the ratio of the carrier's direct payments under the Act to carriers' payments (with medical-benefits payments excluded) and half on the ratio of the fund's payments, under LHWCA Section 8(f), in cases originally the responsibility of that particular carrier to all the fund's Section 8(f) payments.

In the District, the Director applies the 1972 formula in calculating assessments for the DCWCA Special Fund. Thus, the Director acknowledges, and I conclude, that neither the direct-charge-back effect of the assessment formula mandated by the 1984 Amendments nor the explicit provision of Section 8(f)(2)(B) of the 1984 Amendments which gives an Employer standing to participate in Special Fund cases of this type is applicable to DCWCA claims. <u>Keener</u>, <u>supra</u>.

III.
<u>Standing Pursuant to the DCWCA</u>

Alternatively, both the Employer and the Director believe the Employer has standing in this matter under the LHWCA and the DCWCA as they existed prior to

1984. At the hearing, it was suggested that the Employer in Metropolitan Stevedore Co. v. Rambo, 115 S.Ct. 2144 (1995), may have participated as the primary party in interest opposing a pre-1984 amendment modification petition filed by a Claimant. Research reveals, however, that the 1984 Amendments were applicable in Rambo. Thus, in its brief before the Supreme Court, the Special Fund represented to the Court that the applicable regulation authorizing the Employer's participation was set forth at 20 CFR 702.148(b) and the Court applied it. (See, DOL's Sup. Ct. Br. At fn. 3; Rambo, supra at 2146)). Section 702.148(b), as cited in the brief, however, expressly affords the Employer standing to participate in the matter and was promulgated specifically to implement the 1984 Amendments. The provision did not exist in the 1983 or 1984 Code of Federal Regulations (CFR). It was published for the first time in the1985 CFR; "consistent with their (Employers') greater direct liability stemming from the amended assessment formula..." 20 CFR §702.148(b)(1985).

In post-hearing submissions, the WMATA and the Director cite the language of the Board in Azzolino v. Marine Terminals Corp., 9 BRBS 566, 569 (1978). The Azzolino Board stated: "it is not the purpose of Section 8(f) to facilitate Claimant's bargaining against employer's valid defenses or to provide Claimant with a strategic advantage by shifting to the Director the burden of asserting employer's defenses." At 569. Yet, the circumstances in Azzolino are obviously distinguishable from the circumstances here.[11]

In this instance, the Director is not called upon to assert any Employer's defenses. The employer, as will be demonstrated later, has no real interest in this matter. There is, therefore, no shifting of burdens involved in this case. The Director may be expected to assert such defenses as Special Fund may have in furtherance of his own responsibility to protect the Special Fund.

Careful analysis also demonstrates that Wagner v. Alabama Dry Dock and Shipbuilding Co., (ADDSCO) 17 BRBS 43 (1985), cited by the Director is inapposite. In Wagner, the employer's participation was based upon a dispute concerning the amount of direct compensation for which the Employer and the Special Fund were respectively responsible under the terms of a settlement

[11] While the burden shifting concerns for which WMATA and the Director cite Azzolino are distinguishable, the Director's arguments and the Board's ultimate decision actually support Terrell's motion as discussed in detail at pages 5-6, infra.

agreement. Alabama Dry Dock, unlike WMATA here, thus had a direct financial stake in the outcome.

A.
The 1984 Amendments Did Not Merely
Codify Existing Law

Employer and the Director further rely upon the party status conferred upon the Employer by 20 CFR §702.333(a). That regulation, it is argued, conclusively describes who is a party entitled to participate in proceedings on a claim under the Act, and no exception is made for modification proceedings in cases being paid from the Special Fund. The Employer and Director contend that the employer or carrier is always a party under the terms of 20 CFR §702.333(a). The Director further admonishes: "It is not open to this tribunal to create exceptions to a governing regulation...The Director thus submits that §8(f)(2)(B) (of the Act) added in 1984, (granting the employer continuing status as a party in Special Fund cases), merely codified what was always the law."

While the legislative history of the 1984 Amendment suggests that the conferees did "not intend to expand or contract the rights of an Employer...beyond those prevailing in a non-Special Fund case," the conferees did acknowledge that according Employers continuing party status in Section 8(f) cases: "is consistent with the employer's greater direct liability stemming from the amended assessment formula." (House Conf. Rep., 90-1027 (Sept. 14, 1984), p. 32, emphasis added). The Director further concedes that the Special Fund has found no case prior to the 1984 Amendments which addresses the question of the employer's status in a proceeding in which a claimant seeks to increase his or her Special Fund payments. More broadly, neither the Director nor the employer has identified a single case in which an employer even participated in a case to contest a claimant's effort to increase his or her Special Fund award prior to the 1984 Amendments. Consequently, the Director's argument that the 1984 Amendment merely codified what was always the law would not appear to find much support in the Director's own research.

There is, however, case law which suggests the contrary. Courts have held that only the Director has any real interest in protecting the financial integrity of the Special Fund. Thus, the Circuit Court in Director v. Cargill, Inc., 15 BRBS 30 (CRT) (9th Cir. 1982) observed:

> Only the Director has a real interest in protecting the fiscal integrity of the Fund against unjustified payments. The employers insurance company, otherwise liable for payments to the Claimant, has no interest in contesting an award from the Fund, and the employee's only interest is receiving the benefits, regardless of source. Cargill at 31 (CRT).

Significantly, for purposes of this proceeding, the District of Columbia Court of Appeals has approvingly cited the Ninth Circuit's Cargill analysis. See, Henry v. George Hyman Const. Co., 17 BRBS 39 (CRT) (DC cit. 1984). Indeed, both Courts recognize the Director's standing to contest the applicability of Section 8(f) precisely because the Director, prior to the 1984 Amendments, was "the only party who has a real interest in protecting the fund." George Hyman at 42 (CRT). See, also, Director v. Newport News Shipbuilding, 676 F.2d 110, 114 (4th cir. 1982). Thus, the regulations promulgated and published by the Director to implement the 1984 Amendments, state that the employers' participation rights are, "consistent with their greater direct liability stemming from the amended assessment formula..." 20 CFR § 702. 148(b).

Neither an employer's direct liability for fund payments to its employees nor the party status of employers in cases of this type existed in the Director's regulations or in the statute prior to the 1984 Amendments. As a practical matter in actual effect, the 1984 Amendments increased the employers' direct responsibility for their employees who receive compensation from the Special Fund, and it expanded employers' rights to oppose efforts by their employees to increase Special Fund compensation. For these reasons, and in the absence of any proffer of contrary authority, I conclude the Director's contention that the 1984 Amendments merely codified existing law is not well founded.

## B.
## Party Status Under the Regulations

The Director notes further that Section 702.333(a) of the regulations pre-dates the 1984 Amendments, and it provides that the Employer is a party in proceedings under the Act. As previously noted, the Director would reprove an ALJ who created exceptions to the Director's governing regulations.

In a general sense, both Claimant and Employer are parties in proceedings arising under the Act. As the Director well knows, however, the Director has occasionally taken the position in litigation that a party within the meaning of Section 702.333(a) is not necessarily entitled to litigate every issue which might arise under the Act. The initial question here then is whether it is open for department administrative tribunals, and ALJ's in particular, to consider the applicability of Section 702.333(a) without the Director's express approval in appropriate circumstances.

I conclude that authorization to consider the question is now derivative of the case law. An ALJ does not require the Director's approval to proceed. Thus, Section 702.333(a) conferred party status upon William Azzolino in his proceeding under the Act. See, Azzolino v. Marine Terminals, supra. In Azzolino, Claimant settled his case against the Employer, then sought additional compensation from the Special Fund under Section 8(f).Yet, when Azzolino sought compensation from the Fund pursuant to Section 8(f), the Director did not merely oppose his claim, it argued, and the Board agreed, that Azzolino was not, despite the general applicability of Section 702.333(a), a proper party to raise Section 8(f). The Board ruled that it was not suggesting that, "Claimant has no interest in the application of Section 8(f)," but it did hold that, "Claimant is not a proper party to raise Section 8(f)." Azzolino at 568. The ALJ, therefore, "erroneously permitted the hearing to proceed with Claimant's claim against the Special Fund." Azzolino at 569.[12] Indeed, notwithstanding Section 702.333(a), the Board concluded that it was error to permit the hearing to proceed with claimant's claim against the fund. We thus learn from the Director's argument in Azzolino, that a party under Section 333(a) is not necessarily a "proper party" under all circumstances even though the regulation contains no specific exceptions.

Although Section 333(a) "never made any exception" against claimant's asserting 8(f) claims, a claimant is not, as a result of the Board's administrative interpretation, a "proper party" in such cases. Moreover, in reaching the result urged by the Director, the Azzolino Board overruled one of its own prior decisions

[12]Section 702.333(a) in effect in 1979 provided that "the necessary parties for a formal hearing are the Claimant and the employer..." 20 CFR §702.333(a)(1979). As Azzolino demonstrates, a "necessary party" under the regulations is not necessarily authorized to litigate every issue in a longshore proceeding.

which was perhaps more consistent with Section 333(a).[13] It is, therefore, respectfully submitted that it would not constitute non-acquiescence in the Department's regulation for an ALJ to decide whether a party under Section 333(a) is a "proper party" to litigate particular issues arising under the Act.

## C.
## The Employer's Interest

It should here be emphasized that an employer is always a proper party to contest a modification which affects its direct liability to a claimant. For example, if a claimant were seeking to increase his or her average weekly wage, the employer potentially would be affected directly even if compensation were being paid by the Fund. During periods of any temporary total disability, the increase in average weekly wage would increase the compensation rate the Employer would be required to pay. Under such circumstances, the employer would potentially have a direct financial stake in the proceedings.

At this point, however, it is necessary to eschew generalities. The Director argues that requests to increase compensation paid by the Special Fund could effect this Employer's direct liability to the Claimant. Although the Director suggests otherwise, WMATA is not directly at risk if Claimant seeks to increase his compensation based upon an increase in his disability from permanent partial to permanent total disability. Given the same average weekly wage, as in this case, the Employer would not be responsible for any increase in the Fund's payment on the permanent disability, and the amount of any temporary total disability for which the Employer potentially might be responsible would not change. It would remain, both before and after the modification, at 66 2/3% of the Claimant's average weekly wage. See, Sections 8(a) and 8(b) of the LHWCA.

The Director also suggests, in general, that an increase in Special Fund payments might effect the Employer's liability for medical benefits. The Employer is presently responsible for medical benefits associated with the care and treatment of Claimant's injury. As such, it monitors his care and treatment and, notwithstanding the level of compensation paid by the Fund, the Employer is free to challenge any claimed medical benefits associated with a condition unrelated to

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[13] Azzolino, supra, overruled Jackson v. Williamette Iron & Steel Co., 8 BRBS 9 (1978).

the injury.  Even if the Fund agreed to increase Claimant's compensation, its agreement would not bind the Employer to pay any medical benefits it would not have otherwise been required to pay before the increase.

While the Director argues generalities, not all of which are here pertinent, the Employer in this particular case recognizes that Claimant's petition to increase his Special Fund payments under these circumstances, really involves no direct risk to the employer either in terms of medical benefits risk (Tr. 17), or an increase in potential compensation to temporary total disability. (Tr. 17-18).

The Director and WMATA next argue that WMATA has a legally cognizable interest in the Claimant's request for modification under the D.C. Special Fund assessment formula, because WMATA is the largest carrier in terms of the continuing direct payments which determine its share of the overall assessment requirements.  The Director notes that the number of cases in which continuing benefits are being paid directly by a carrier under the applicable DCWCA, and the total amount of those payments, have dramatically decreased over the years.  The number of cases being paid out of the Find, under §8(f), and the amount of all Fund payments under the Act have recently declined, but have not declined as quickly as direct employer payments, because all of the Fund's payments are for permanent disabilities, and because the Fund does not "settle out" its remaining liability while carriers may settle to avoid continuing future assessment liability.  The Director further advises that: "in 1997, more than $10,000,000 in liabilities of the old-DCWCA Special Fund were spread among the remaining carriers still bearing direct liabilities, based on their shares of only $6,3612,000 (sic) in 1996 direct payments reported under the old Act.  Since WMATA reported direct payments of about $655,000 in 1996, it bore liability for more than ten percent, or $10 of every $100, of all payments made from the Fund under the old Act."  The Director and WMATA contend that WMATA's assessment to the Special Fund entitles it to participate as an "interested person" in these proceedings under the Administrative Procedure Act, 5 USC §55(b), and the Fifth Amendment of the Constitution. These arguments are lacking in merit.

The Employer here has prevailed in asserting its 8(f) defense, and, accordingly, under the law in effect prior to the 1984 Amendments, and the particular circumstances of this case, it has no direct liability to Claimant in this proceeding.  Further, the Employer's contribution to the Special Fund under the formula in effect in the District is too remote, and its potential increase as a result of any outcome in this proceeding too speculative, to support a showing of substantial harm, actual or impending, to any legally protected interest.[14]

Although WMATA and the Director do not address these cases, the Courts have held that publically administered, employer financed trust funds do not to constitute property of contributing employers. Gange Lumber Co. v. Rowley, 326 U.S. 295 at 310, 66 S. Ct. 125 at 128, 90 L. Ed 85 (1945); Railway Express Agency v. Kennedy, 189 F.2d 801, (7th Cir. 1951), cert denied, 342 U.S. 830, 72 S.Ct. 54, 96 L.Ed. 628 (1951).

Thus, in Gange Lumber, an employer appealed from an award of additional compensation to Claimant pursuant to a statute retroactively extending the time period in which workmen's compensation awards could be modified under a state administered fund financed by employer premiums. In Railway Express the employer challenged the award of unemployment compensation payments to striking workers from the federally administered Railroad Unemployment Fund. Employers in both proceedings argued that improper awards against the Fund would impact on the rates charged the Employer in the future years. Gange Lumber, 66 S.Ct. at 128; Railway Express at 804.

Yet, in both cases, the Courts found the possible increases in the premiums of the individual employers to be comparatively small and "nothing more than a bare possibility of injury in the future." Gange Lumber, 66 S.Ct. at 130. Both Railway Express and Gange Lumber held that the appellants "ha[d] not made the showing of substantial harm, actual or impending, to any legally protected interest" such as to make either an "aggrieved party." Railway Express at 805; Gange Lumber, 66 S.Ct. at 130. Moreover, the rationale of Court in Gange Lumber is equally applicable here. Contrary to the Employer's contentions, Gange Lumber holds:

> The fund is therefore in no sense the private property of the employer.... Consequently the payment of awards out of the Fund in itself could not amount to a deprivation of employer's property. Gange Lumber, 66 S.Ct. at 128.

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[14] The Director concedes that future events could lessen the Employer's assessment even if Terrell succeeds in increasing his payments. For example, as the mortality rate of claimants paid by the Fund increases over time, Fund liabilities could decrease along with the corresponding Employer assessments.

Moreover, like Gange Lumber, WMATA has failed to show:

> Some substantial and immediate harm to present a justiciable question concerning the states power [in administering the Fund]. The injury as it appears from this record, is neither so certain nor so substantial as to justify a finding...that appellants' substantial rights have been or will be invaded by allowance and payment of the award. Gange Lumber, 66 S.Ct. at 130.

The Director's argument that WMATA would, because it is the largest District carrier under the Act, be responsible for about 10% of any increase in Terrells' compensation does not render Gange Lumber inapplicable. The fact that Terrell was employed by WMATA is really not relevant. WMATA, under the District assessment formula, would be responsible for precisely the same percentage increase in its assessment even if Terrell were employed by some other District employer.[15] Neither the Director nor WMATA contends that assessment increases WMATA might incur as a result of an increase in Fund payments to some other employer's worker would render WMATA a proper party in every district Special Fund case.

Conversely, it should be noted that, assuming the accuracy of the Director's estimate, 90% of any increase paid to Terrell would be assessed against other District employers, all or at least the largest of which, would, applying the Director's rationale and WMATA's logic, have a right to participate as a party in this and every other District Special Fund case. Yet, neither the Director nor the Employer cite a single case in which an Employer's contribution to the Fund alone justified its participation as party in any Special Fund case of this type.

Finally, it is not clear, assuming Terrell were to prevail on his petition, that WMATA or any other District employer would experience an increase in its Special Fund assessment. In 1979, the D.C. Council, severed the application of Longshore Act to the District of Columbia effective July 26, 1982. (D.C. Code §36-501 et seq. Consequently, in the District, only cases arising out of injuries, such as Terrell's, suffered prior to July 26, 1982, are potentially subject to Special Fund awards. The

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[15]Presumably, decreases in Fund liability, would result in proportionally larger decreases in WMATA 's assessments.

Director observes accordingly, that Fund payments, "under the old Act," have recently begun to decline.

Even considering the pace of administrative adjudications, it is unlikely that many Section 8(f) cases remain unresolved which might add to the population of claimants receiving Special Fund payments. The District's Special Fund is not, 16 years after the last covered injury, greatly expanding its claimant population. Rather, over time, the natural law of attrition will diminish the aging population of Special Fund recipients until, eventually, WMATA's assessment will decline to zero. Moreover, in any given year, the attrition of Fund recipients could cover the increase in Fund payments to Terrell. The potential increase in WMATA's assessment as a result of any outcome in this proceeding is, therefore, nothing more than a "bare possibility of injury in the future." Gange Lumber, supra.

WMATA next argues that, "In the case at bar, WMATA has stepped into the shoes of DOL in defending this matter." (WMATA Br. At 4) The Department of Labor we are told, is substantially overburdened, and cannot devote the resources necessary to defend the Special Fund against this former bus driver's claim. WMATA's argument is similar to rationale expressed by the conferees in the legislative history of the 1984 Amendments. The conferees, in granting employers continuing status as parties in Special Fund cases, noted the Department's "inability" to monitor existing fund cases. (HR Rep. 90-102, supra at p 32). Along with a change in the assessment formula increasing each Employer's direct responsibility for its employees paid by the Special Fund, the conferees granted the employers continuing party status in Fund cases.

Since the Amendments lessened DOL's burden to defend the 8(f) Special Fund in Longshore cases nationwide, the demands of defending the Special Fund in a case of this type are obviously less onerous than they once were. Indeed, the Director who is in the best position to assess his own resources and burdens does not adopt WMATA's argument in this respect.

In any event, as applicable in this proceeding, the Act, prior to the Amendments, requires the Director to act as the Trustee of the Special Fund with responsibility not only to defend the Special Fund against unjustified claims but pay appropriate claims. As such, the Employer cannot stand in DOL's shoes in this proceeding. For example, the Employer is not at liberty to contest a claim of this type which the Director believes is meritorious. Indeed, it is the Director's responsibility not to contest claims which the Director believes are worthy of approval, even though an Employer may disagree. (See, Sections 8(f)(2); 14(h) and (i); the Director has even appealed a denial of total disability benefits on the ground, inter alia, that the Director has an obligation to ensure "adequate compensation to claimants." See, Director's Argument to the Supreme Court in Director v. Newport News Shipbuilding and Dry Dock Co., 514 U.S. 122, (1995) rejecting the Director's argument on grounds the Director was not adversely affected or aggrieved by the denial). In this sense, the position of WMATA here is analogous to the Director's in Newport News. Under circumstances in which the Director, not the Employer, is directly and financially responsible in his capacity as Special Fund Trustee, the Director might settle a Special Fund claim which an employer might otherwise oppose.

Conversely, the Employer could not settle this matter by committing the Special Fund to increase Terrell's award in whole or in part. As a fiduciary of the Special Fund, the Director might agree to such a settlement, but might also reject it if the Director determined that the settlement adversely affected the Special Fund. The Director, not the employer, has an obligation to protest any unjustified claim. Cargil, supra, at 31 (CRT); George Hyman, supra at 39 (CRT); See also, Director v. Brodka, 643 F.2d 154 (3rd Cir., 1980); and Gurule v. Director, 11 BRBS 664 673 (1979); (discussing the responsibilities of the director as Trustee under the Black Lung Trust Fund in language similar to the Court's view of the Director's responsibilities to protect the Special Fund in Cargill). Accordingly, the Director, and only the Director can stand in DOL's shoes and defend the Special Fund to the extent the Director may believe Terrell's claim lacks merit.

## III.
## Due Process

I am mindful and protective of the Employer's due process concerns. Had the employer identified any direct interest or liability to Claimant which could arise out of this proceeding as the issues are presently framed, the Employer clearly would have had standing to participate as a proper party. Yet, WMATA, in respect to this Claimant's petition, stands in the shoes, not of the Director, but of every other employer subject to Special Fund assessments in the District. Employer has identified no potential increase in its direct responsibilities to Terrell which could arise out of Claimant's petition. Consequently, the Employer's interests are no greater or lesser than any other District employer.[16] The Employer has failed to show it would be adversely affected or aggrieved by any increased Special Fund payments to Terrell. See, Gange Lumber, supra.

Since liability for benefits in the instant case has attached to the Special Fund, WMATA is not a party which would be "adversely affected" by a decision or order affecting Special Fund payments to Terrell. Grange Lumber, supra. WMATA would not, therefore, be injured by an increase in Special Fund payments to Terrell, nor is its Special Fund assessment within a protected zone of interest. Gange, supra; See also Director v. Newport News Shipbuilding and Dry Dock Co., 514 U.S. 122 (1995); Cargill, supra; George Hyman, supra. Under such circumstances, WMATA avers no injury peculiar to itself, as distinguished from the great body of its fellow District employers, and accordingly, it lacks standing to contest Claimant's petition.

For all of the foregoing reasons, WMATA has failed to establish that it is a proper party to defend against Claimant's petition to increase his compensation from the Special Fund based upon an alleged change in condition from permanent partial to permanent total disability.
Accordingly:

ORDER

IT IS ORDERED that Claimant shall not be required to respond to the discovery filed by Employer on March 16, 1998;

IT IS FURTHER ORDERED that the Employer shall not be permitted to participate as a proper party to defend the Special Fund against Claimant's petition

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[16]Should Claimant in the future assert any claim against the Employer, the Employer would, of course, not be bound by any action the Fund may take in this proceeding, and would be free de novo to protect its interests.

to increase his Special Fund Compensation; based upon the alleged increase in his disability from permanent partial to permanent total.

IT IS FURTHER ORDERED that in all other respects, Claimant's Motion Shall be, and hereby is, DENIED.

STUART A. LEVIN
Administrative Law Judge*

* The original was signed manually prior to use of electronic signatures by the Department of Labor. This electronic copy, therefore, cannot reproduce the original signature.